No. 2431

United States
Circuit Court of Appeals
For the Ninth Circuit

GLENN R. BOTHWELL, as Trustee in Bankruptcy, of AMERICAN FALLS CANAL & POWER COMPANY, Bankrupt,

Appellant and Petitioner,

vs.

T. E. FITZGERALD and W. A. WEST,

Appellees and Respondents.

In the Matter of AMERICAN FALLS CANAL & POWER COMPANY, a Corporation, Bankrupt.

Brief of Defendants in Error

Upon Appeal from the United States District Court for the District of Idaho and upon Petition for Revision under Section 24b of the Bankruptcy Act of July 1, 1898.

W. E. SULLIVAN and
L. L. SULLIVAN,
Counsel for Appellees.

SYMS-YORK CO., PRINTERS & BINDERS, BOISE

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PROCEEDINGS CHRONOLOGICALLY ARRANGED.

1913

Mar. 22—Actions commenced by West and Fitzgerald against Canal Company for damages for loss of crops, the principal issue being whether lateral 33 was completed. (Rec. 107, 118).

Sept. 17—Judgment favor Mary A. Fitzgerald against Co. for $2715.00. (Rec. 70).

1914

Feb. 24—Co. filed Voluntary Petition in Bankruptcy. (Rec. 1).

Feb. 27—Company adjudged a bankrupt. (Rec. 6).

Mar. 16—Bothwell elected Trustee by Creditors. (Rec. 2).

Mar. 28—Judgment by confession favor West against Co. for $2715.00. (Rec. 71).

Apr. 6—West and Fitzgerald commence Receivership suit against Co. in State Court. (Rec. 12).

Apr. 6—Order on Co. to show cause why Receiver should not be appointed. (Rec. 9).

Apr. 11—Co. filed answer and applied for stay.

Apr. 11—Hearing State Court on appointment of Receiver.

Apr. 11—Petition filed in Federal Court by Trustee, to enjoin action in State Court, and for appointment of ancillary trustee. (Rec. 1).

Apr. 13—State Court appoints Receiver of Canal Co.

Apr. 13—Order issued by U. S. Ct. to show cause why action in State Ct. should not be enjoined. (Rec. 39).

Apr. 17—Answer filed raising question of assets; also praying that if they were assets, then court appoint ancillary trustee and direct him to complete said lateral. (Rec. 53).

Apr. 17—Hearing U. S. Ct. on order to show cause; order entered enjoining parties from proceeding in State Court, ordering Tr. to make application to Utah Ct. to rebuild lateral 33 and ordering Tr. to report on May 5th. (Rec. 154).

May 4—Report of Trustee and hearing thereon. (Rec. 57).

May 4—Order entered vacating order dated Apr. 17. (Rec. 156).

May 15—U. S. Court denied Supersedeas on ground that Trustee had failed to comply with order and had pursued contrary course. (Rec. 162).

STATEMENT.

We adopt the statement of Appellant as to the general proceedings in the State and Federal Courts.

For convenience we will hereafter refer to the United States District Court for the District of Idaho as the Idaho Court and the United States District Court of Utah as the Utah Court.

In order to thoroughly understand the reason for the entering of the orders of the Idaho Court it is well to know, in somewhat greater detail, what transpired in said Court. The matters there presented were in a bankruptcy proceedings and were very informal and no record made of the same except the petition, answer, and final orders.

We believe that, in justice to the lower court, this Court should be informed of what transpired and how it came about that said Court finally vacated its former order. While these matters are not all of record, we believe that inasmuch as the order of April 17th was entered by the consent of counsel for the Trustee and with his approval, we will be justified in stating herein what transpired between the Court and the attorneys. These matters are reflected in the final order of said Court, and, in fact, it is shown therein that the Court considered that its former order had not been complied with by the Trustee, and our statements are further corroborated by the order refusing a supersedeas.

First came the argument of counsel on the law features; particularly whether or not certain deferred water payments were assets; the answering parties praying that if the Court held they were assets, that then an ancillary trustee be appointed with directions to complete said lateral 33, and collect the deferred payments in an amount sufficient to complete the same. The Court held that said deferred payments were assets. Then came the discussion between counsel and Court as to the relief that should be awarded the defendants, that is, whether the Court should appoint an ancillary trustee to complete said lateral or whether he should allow the Trustee under order of the Utah Court to complete the same.

In the discussion as to the form of the order and the relief to be granted, counsel for both parties were, at first, of the opinion that it would be better to have an ancillary trustee appointed to look over the situation and report to the Court what was necessary to complete said lateral. The Court frankly stated it would rather not appoint an ancillary trustee, as then would come up the question of raising of funds for his expenses and disbursements. Attorney Skeen, attorney for the Trustee, then stated that he believed that the Trustee was very familiar with the work and could reconstruct the lateral more economically than any one else, and further, that if the Court would give him time to return to Salt Lake and take the matter up with the Trustee, that he would have him file a petition in the Utah Court praying that he be allowed to reconstruct said lateral. The Court then stated that if counsel for the Trustee would do that, it would be the best thing to do, provided he would act at once as the irrigation season was coming

on, the Court having been informed, upon inquiry, that some crops were already in and the parties desired to plant others for the year 1914. Counsel for defendants thereupon raised the point that this would necessitate their clients going to Utah, at great expense, to take part in the proceedings there, which would be taking them out of this jurisdiction, when they were entitled to have their difficulties settled in this State where the property was situated and that inasmuch as the Trustee was petitioning for ancillary administration in Idaho, they would prefer to have one appointed and have him directed to do the work which the State Court had directed the Receiver to do. The Court replied that he thought that the water right holders should not be forced to go to the Utah Court for a remedy, provided there was any contest, but that he understood from the statement of Attorney Skeen that he would attend to presenting the proper ex parte petition and getting an order directing the Trustee to do as suggested by the Court; and that it would not be necessary for the other parties to appear. Counsel for Trustee said such was his intention. Counsel for defendants then stated that would be satisfactory. The Court thereupon directed Counsel to confer and draft an order along the lines talked of.

Counsel for both parties met and drafted the order dated April 17th. This order was entirely dictated by counsel for the Trustee, with but very few suggestions by counsel for defendants. And in this very order counsel for Trustee recited that it was made to appear to the Court that it was the duty of the Trustee to apply in the Utah proceedings

for authority to reconstruct lateral 33, and the Court so found in its order of April 17th. (Rec. 154).

On May 4th, the day set in the Idaho Court for the Trustee to report as to his proceedings in the matter, Attorney Skeen appeared at Boise, Idaho. The parties met in the Judge's Chambers and attorney for the Trustee stated that he appeared to make his report. A copy of the petition filed in the Utah Court was handed to the Judge for his inspection. After glancing through the same, and reading therefrom, he remarked that the petition filed was directly contrary to the one he had ordered; that it had been understood that the Trustee would file a petition directly requesting authority to reconstruct said lateral; that there was to be no contest over the matter requiring defendants to try issues in Utah; that the Trustee had directly alleged in his petition that said lateral was properly constructed and prayed that this question and all others between the parties be heard and determined in Utah—directly contrary to the understanding and his order. Counsel for Trustee thereupon replied that after going over the matter with the Trustee, they had concluded it would be better to file the petition in another form and present all matters to the Utah Court for determination. The Court thereupon wanted to know why, if the Trustee would not file such a petition as directed, the matter had not been reported to him at once instead of filing a petition directly contrary to the understanding and the order of the Court. Counsel then stated that after talking to the Trustee they concluded it would be better to put it in the other form, so he had filed a petition accordingly. The Court then made further inquiry as to what had been done as to the petition

filed. He was informed that they had not yet been able to get the matter determined before the Utah Court. The Court then stated that it was clear to him that his order had not been carried out by the Trustee, but that he had acted contrary to the understanding had between counsel and Court that the terms of order would be complied with. The Court then added that the Trustee had come into a Court of Equity and that if he did not intend to comply with the orders of the Court, and do equity, that he could receive no relief from said Court; and the Court thereupon prepared, in the presence of counsel for both parties, the order (Rec. 156) vacating his former order.

If this Court thinks, that in justice to the lower court and appellees, we are not justified in stating the foregoing discussions as throwing light on how the Court came to enter the orders in question, and that we have transgressed on the well known rule that matters not in the record will not be considered, we then call your Honors' attention to the same facts, but not in detail, so plainly stated by the Court itself in the very orders in dispute and also in the order denying the supersedeas.

PURPOSE OF ACTION IN STATE COURT AND HOW QUESTION OF ASSETS OF BANKRUPT AROSE.

We do not intend herein, and have not at any time intended, to dispute the rule set forth in appellant's brief to the effect that from the time of the filing of the petition in bankruptcy that the estate of the bankrupt is *in custodia legis;* and that upon adjudication, the property of the bankrupt, wherever situated within the limits of the

United States, passes into the possession of the Court. But the question that arose in Idaho, both in the State and Federal Courts was, were certain deferred payments on water contracts assets. To explain, we will briefly state our position on the institution of the action in the State Court after the Canal Company was adjudicated a bankrupt. Just prior to the institution of the action in the State Court, the Supreme Court of the State of Idaho had rendered a decision in the case of Childs v. Neitzel, 141 Pac. 77, directly bearing upon deferred payments on water contracts going to the completion of a canal system and holding that the Canal Company or its mortgagee cannot collect the same when the Company is insolvent and the system not completed.

The Court held:

> "Those contracts were made by the purchasers of water rights with the Murphy Company and that Company could not have enforced the collection of the deferred payments and interest thereon without complying with the terms thereof as to the construction of said system and the delivery of water, and neither the mortgagee nor the assignee could acquire any greater rights in that regard than the Murphy Company itself had under said water contracts."
>
> "However, if water has not been made available to others holding water contracts, in case the construction company is insolvent, such water right owners might be injured by the noncompletion of the system, and upon proper application, a court of equity might require the payments due and to become due from the water users to whom water had been made available to be paid to a receiver to be used in the completion of such system."

So we contended that the deferred payments under the Childs-Neitzel decision could not go to or be collected by

the Canal Company (or its Trustee in Bankruptcy) or by the mortgagee, holding the water contract as collateral, but must go into the system. So there are no assets until the system is completed which the Trustee could take possession of or hold or distribute. The deferred payments, above all creditors whether secured or unsecured, must go to complete the system. The Trustee in Bankruptcy could not collect as assets something which the bankrupt could not collect.

We further contended that the local laws govern largely as to what are assets of the bankrupt, the varying rights of debtor and creditor under the laws of the several states and what interests attached under the laws of the different states by certain parties in the property of the bankrupt depend entirely on the state laws. Therefore the laws of Idaho as to what were considered assets would control.

And further, we contended that the fact the system has not been completed took the deferred payments out of the assets of the bankrupt estate as defined in Sec. 70a of the Bankruptcy Act.

The amount to complete the system is an amount which the creditors of the bankrupt could not take in payment of their claims. It is well recognized law that the trustee has no better title than the bankrupt had, that he stands in the shoes of the bankrupt and is affected by every equity which would affect the bankrupt himself if he were asserting the same rights and interests.

Such was the basis of the action in the State Court after institution of the bankruptcy proceedings.

ORDER CONSISTED OF TWO PARTS, DIRECTING ONE PARTY TO DO ONE THING AND THE OTHER PARTY TO DO ANOTHER.

The order of April 17th contained two clauses, one against the appellees herein and one against the appellant. Briefly stated, they are as follows:

1. Enjoining West and Fitzgerald from prosecuting their action in State Court.
2. Directing the Trustee to make application at once for authority from the Utah Court to reconstruct lateral 33.

The above order is not appealed from. So if this Court holds that an appeal is the proper remedy on such orders, rather than a petition for revision, then clause No. 2 is final and must stand as the time for appeal on said order has expired.

If, however, this Court determines that the petition for revision is the proper remedy, then it becomes necessary to discuss the error assigned in the petition for revision on the above clause 2, wherein appellant takes the position that the Court erred in including said clause in said order.

IT WAS THE DUTY OF COURT TO ENTER ORDER ON TWO MATTERS.

Appellant contends on page 20 of his brief that upon the showing made, it clearly became the duty of the Idaho Court to issue an order restraining further prosecution of the action in the State Court and then states that it was the duty of the Idaho Court to enter the first clause as it was within its jurisdiction, but that in entering the second clause, it exceeded its jurisdiction.

In answering such contention, we claim that under the same petition of the Trustee and exhibits attached and the answer of West and Fitzgerald, there was a further duty to be performed by the Court. We will admit for the purpose of the discussion of this question that it was the duty of the Court to enter clause one as to the restraining order. We then have two duties which should have been performed by the Court under the matters presented, as follows:

1. Duty to enter restraining order.
2. Duty to appoint an ancillary trustee to act in Idaho.

Appellant entirely overlooks the second duty when in fact this is where the real controversy between the parties arises. If the Court had complied with its second duty and appointed an ancillary trustee and submitted the matters to him for action then there would have been no need of clause 2 in said order. And it was upon the promises, and with the assurance of counsel for Trustee, to carry out the desire of the Court that the Court entered clause 2 in its order instead of appointing an ancillary trustee. Now it is appellant's endeavor on this appeal to retain clause one on the restraining order against defendants in full force and have clause 2 against the Trustee vacated or declared to be of no force and effect. If such practice is, or has been, permitted by any Court, whereby parties can promise to do certain things and consent to an order and after they secure the advantage they desire thereunder, wholly disregard that part directed against them and still ask relief under the same order, we have been unable to find any authorities which will support such action and conduct. While there may have been no in-

tention whatever on the part of counsel for the Trustee to deceive the Idaho Court, the Trustee should not be allowed at this time to rescind that portion of the order which was against him. It should be borne in mind that this procedure was in April and the irrigation season was approaching and that the Trustee, by action of its counsel in consenting to the Order of April 17th, gained further time, to-wit, May 4th, 1914. If the order had not been agreeable to the counsel for Trustee, then the Court would have appointed an ancillary trustee and the West and Fitzgerald matters would have been taken up at once and no doubt determined so that they would have been able to have obtained relief by having lateral 33 completed so they could have received water for their crops and the irrigation of their lands during the season of 1914. So we believe that even if counsel for Trustee was acting in entirely good faith in assenting to said order, and it was his intention to have the same carried out as agreed upon, the Trustee should not be allowed at this time to seek to rescind said clause 2. It would be allowing him to take advantage of his own wrong, that is, allowing him to repudiate an agreement in Court entered for his interests, but still seeking to obtain the benefit of that portion of the order against his opponent.

He could not say to his counsel, I will not file such a petition, but I will file one just the contrary, and meanwhile you need not report to the Court that I will not comply with his order, but we will take our full time and get along into the irrigation season as far as possible so they will get no water at least this year.

This case is not similar to one where a Court had only

one duty to perform and order one party to do one act and then of his own motion order the other party to do another act. In such a case the additional order might not have any real legal existence. But how different here. The Court had jurisdiction and the pleadings required the Court to enter an order in reference to two matters. Here counsel for petitioner, recognizing the authority of the Court to enter an order appointing an ancillary trustee, steps in and requests the Court not to enter such an order and suggests, in lieu thereof, that the same result can be secured in another way, without causing the adverse parties any trouble or expense, and then requests that an order be entered accordingly. The entering of the order in the form suggested, under such circumstaances and in lieu of an order that the Court had jurisdiction to enter, makes it a legal and valid order that can only stand and be considered as a whole and as one order, and if violated by either party, then that party should be promptly and equitably denied any relief if he petitioned or appealed to still have that part of the order against his adversary stand in full force and effect. This principle is so elementary in equity and so well established that we do not deem it necessary to cite a single case in support thereof.

IDAHO COURT DETERMINED LATERAL NEEDED RECONSTRUCTION.

As showing that the Idaho Court in the proceedings before it found that it was necessary to reconstruct lateral 33, and that the only thing it requested of Trustee was to secure authority for him to do the work, we call attention

to the introductory part of the order of April 17th, as follows:

> "And it further appearing that it is the duty of the said trustee in bankruptcy to apply to the referee in bankruptcy for authority to reconstruct and rebuild a certain lateral conveying water from American Falls Canal & Power Company system to the lands of said T. E. Fitzgerald and W. A. West—commonly known as Lateral No. 33—so as to properly irrigate said lands."

The above fully supports that part of the order directing the Trustee to make application for said authority and shows the Court had concluded that it was necessary to reconstruct. The question of the necessity of reconstruction was before the Court and fully presented, besides the record itself showed that the Company had contested this identical matter in the State Court and that the jury had found that said lateral had not been completed and a judgment entered thereon from which no appeal had been perfected, also that Company had thereafter confessed judgment in favor of West in an action wherein the same issue was raised; and still other matters arising since the Fitzgerald judgment wherein the Company had signified its willingness to reconstruct and raise said lateral were presented to the Court and it then found as above set forth and followed with the clause in the order herein in dispute.

ANSWERING APPELLANT'S ARGUMENT THAT TRUSTEE DID COMPLY WITH ORDER.

On page 22 of the brief of appellant it is stated that the Trustee did wholly comply with the intent, spirit and purpose of the order in question. To make such a statement and believe in the same requires some peculiar reasoning.

We submit that but one conclusion can be reached upon examination of the order, to-wit, that the Trustee was to "make application at once for authority from said Bankruptcy Court within the District of Utah, to reconstruct and rebuild said lateral 33 . . .". We are unable to understand by what processes of reasoning such language can be construed as meaning that the Trustee should file a petition that would put at issue the fact of whether lateral 33 needed reconstruction and then if it was found by the Utah Court that it did not need reconstruction, to then so order. It hardly seems possible that anyone could ask any Court to place such a meaning on such language. The meaning of the order is so clear that but one conclusion can be reached, to-wit, that the Trustee for his own sinister purposes, openly and purposely violated said order of the Court. The trouble lies not in his construction of the order and its plain intent, but in the fact that the Trustee substituted his own wishes for the directions of the Court. He well knew what the understanding was between all counsel and the Court and the purpose and intent of the order. But he thought he saw another chance to put defendants to further trouble and expense and probably make them litigate over again in Utah the question of whether or not lateral 33 had been completed. He and his engineers had taken an active part in the trial in the State Court when this issue was directly raised and tried. The jury found that the lateral had not been completed and awarded Fitzgerald damages. The Canal Company then confessed judgment in the West case wherein the same issue was raised. The record herein gives in full the complaints and shows the issues raised in the State Court and

also shows that judgments were entered in favor of the plaintiffs.

The appellant harps upon the exhaustive petition that he filed with the Utah Court and argues that it was a full and complete statement of the differences between appellant and appellees in reference to lateral 33. The appellant especially refers to several matters set up in said petition, to-wit (pp. 24 and 25):

1. A certain release of Fitzgerald.
2. That the whole system had been completed and accepted by the State Engineer.
3. That the settlers had assumed operation of system in 1910.

and then argues that all these things were necessary to properly advise the Utah Court; and that it could not be expected that the Trustee would ask the Court's permission to reconstruct lateral 33 without disclosing all the *actual facts* and *circumstances.*

These matters give but one side and for some peculiar reason the Trustee in his alleged able petition fails to give further facts regarding said release, to-wit, that at the trial it was proven that there was a further consideration for said release, namely, that the Company would complete said lateral 33 so that Fitzgerald would be able to receive water from that time on; and that the Canal Company then failed to comply with this consideration and further that the matters concerning said release and the considerations therefor were, under proper instructions of the State Court submitted to the jury and they by their verdict held that Fitzgerald was not bound by said release.

Again, the Trustee failed to give all the facts and circumstances concerning the completion of the whole system and its acceptance by the State Engineer or all of the facts concerning the assumed control and operation of the system in 1910 by the settlers. There were two sides to all of these questions and they were fought out before the State Court and we therefore most sincerely urge that the petition was most unfair. We simply mention the fact as to the release as an example in showing how faulty the petition really was from appellees' view point. And we could likewise complain of many of the other issues raised. Appellant no doubt will say that we could have appeared before the Utah Court and met these issues. True, we could if it had been necessary, but that was not the understanding nor in accordance with the order; they had all been once tried in the State of Idaho where the property is situated and between the same parties and it would have been very inconvenient and expensive for appellees to produce their proof in Utah. The Trustee in his petition prayed that the parties might be noticed to appear and that the Court determine all controversies between all the parties and that the Court adjudge the claims of West and Fitzgerald wholly invalid, etc. Such a prayer, raising such issues, was, under the circumstances herein, most unfair and well deserved the condemnation it received in the order of May 4th.

Appellant seeks to justify its position by clause 4 of the prayer, "That if the Court should determine it proper and within the power of the petitioner, as such Trustee in bankruptcy, so to do, authority be given to your petitioner

to reconstruct said lateral No. 33, as suggested in the order made by the United States District Court. . . .".

The wording of the very first line "that if the Court should determine" is a complete disregard of the order of the Idaho Court in that said order in no way contemplates that any issues whatever be raised or determined by the Utah Court. The further words "as suggested in the order" likewise condemn themselves, and show that the Trustee had no intention of complying with said order but was acting on his own initiative, as there is not a single word or sentence in said order which will, under the most extreme construction, warrant the statement that the Court "suggested" any such thing. The said order provides that the Trustee make application at once for authority to reconstruct lateral 33 and does not read that the Trustee shall make application to the Utah Court to hear and determine whether or not said lateral *needed* reconstruction. The order itself shows that it had been made to appear to the Idaho Court and it had reached the conclusion that said lateral needed reconstruction and all it then required was for the Trustee to get authority to do such reconstruction.

The Trustee reported that he had duly presented a petition to the Utah Court and that the Court had the same under advisement. This was 18 days after said order of April 17, and from a reading of the petition requesting that the adverse parties be notified to appear and litigate all their differences, thus raising many issues, it is not strange that the Court had it under advisement and still has it there.

The appellant seeks to excuse his action for praying in his petition for service and placing all matters again in

issue, by the statement, that the prayer should be unimportant, as relief will be directed as the facts warrant. But this excuse does not ring true when so many issues of fact were raised. If the Court could have entered any ex parte order whatever on such a petition it would have been to deny authority to reconstruct.

On page 27 of Appellant's brief, he states that it is inconceivable how either Court without consideration, would insist upon reconstruction of lateral 33. There is nothing inconceivable about it when it is remembered that this issue had been tried by the State Court and later confessed by the Company and the Idaho Court was about to appoint an ancillary trustee, but the Trustee steps in and says: "There is no need to do that; I will get an order from the Utah Court to reconstruct said lateral myself and you can so order, and here is an order prepared by me to that effect."

UTAH COURT HAD NO JURISDICTION OF MATTERS PETITIONED FOR; WHILE IT COULD HAVE LEGALLY GRANTED THE AUTHORITY REQUESTED BY ORDER OF THE IDAHO COURT.

Under Sec. 2 of the Bankruptcy Act, the District Courts of the United States in the several states are made Courts of Bankruptcy and are invested with certain jurisdiction at law and in equity, *within their respective territorial limits.* Said Sec. 2 (20) gives said Courts power to exercise ancillary jurisdiction over persons and property within their respective territorial limits in aid of a Trustee appointed in another Court of Bankruptcy.

Counsel for appellant admits the inability of the Utah

Court to send its process into the District of Idaho to start proceedings in Utah affecting said assets of the Bankrupt. So, evidently acting under said Sec. 2, it petitioned for relief in the Idaho Court and prayed for the appointment of an ancillary trustee to assist him in regard to the assets and matters in relation thereto in Idaho. (Rec. 5).

Then appellees in their answer to the order to show cause, issued under said petition, likewise joined in the request for the appointment of an ancillary trustee, provided the Court held against them on the question of assets, and further prayed that their complaint filed in the State Court, a copy of which was attached to said petition of the Trustee, be treated as their petition in the proceedings before the Idaho Court and that the relief prayed for therein be granted by said Court and that the ancillary trustee, when appointed, be directed to complete lateral 33 and that he be authorized to collect the deferred payments in amounts sufficient to complete said lateral. (Rec. 54).

Now, under the above, it must be admitted that any acts of the ancillary trustee approved by the Court appointing him, or any order or judgment of said Court, in respect to property of the Bankrupt within its territorial limit, would be conclusive and binding upon the Trustee and the primary Bankruptcy Court. If the Trustee did not like the action of the ancillary trustee and the ruling of the Court appointing him, he could not then object to the same and say, this does not suit me, I am under the control of another Court and the ancillary trustee is under me, so I will have the Court which appointed me review this matter and take another course. Such is not the law and the remedy of the Trustee, if he disapproved of any act of the an-

cillary trustee, would be to call the matter to the attention of the Court appointing the ancillary trustee and then if that Court passed upon the matter contrary to his views, then he would have his remedy by appeal or revision to the Circuit Court of Appeals. So the attempt of the Trustee to give jurisdiction of the Idaho parties and subject matter to the Utah Court by the petition which he filed was directly contrary to law and practice in bankruptcy matters. In such a case the Trustee can receive no relief whatever in the Utah Court. But by said Sec. 2 (20) another Court, the Idaho Court, is given jurisdiction over the matters involved herein and to that Court a Trustee must apply for any relief he may seek in regard to such matters and must then abide by the decision of that Court or have the same set aside on review. And the more one considers the petition that was filed by the Trustee in the Utah Court, the more he becomes convinced that it was an attempt to secure an improper and illegal control of certain matters which by express statute were placed within the jurisdiction of another Court.

While the foregoing has the effect of making that part of the order as to the Trustee petitioning in Utah improper if considered alone, that is, that the Idaho Court had no jurisdiction to compel the Trustee to do anything contrary to his wishes, and over his refusal and objection in the Utah Court the situation changes when he consents to act instead of one who could be appointed and compelled to act. The purpose of having the Trustee act, in order to save providing for expenses of ancillary trustee, and having one acting in the bankruptcy matters instead of two and further having one act who was familiar with the com-

pany's business and system, is clearly apparent from the orders and proceedings herein.

The only thing in the order of April 17th that Trustee could complain of was where it directed the Trustee to "make application at once" to Utah Court. He would have been at liberty to refuse to make any such application, but instead he consented, through his attorney, to make one, so the thing that might have been lacking and defeated the jurisdiction of the Idaho Court, to-wit, the consent of the Trustee to make an application for authority to construct (not an application to hear and determine whether construction was necessary) was proffered and accepted, and so imparts validity to the order.

If the Trustee had made the proper application, and the Utah Court had authorized him to do the things stated in the order, there can be no doubt that such authority would have been legally and properly granted.

TRUSTEE BY HIS CONSENT CAME UNDER CONTROL OF IDAHO COURT AND VIRTUALLY BECAME ANCILLARY TRUSTEE AS TO MATTERS BEFORE THAT COURT.

Appellant argues that the supervision and control of Trustees are exclusively under the control of the Court of Bankruptcy having primary jurisdiction and cites three cases. An examination of these cases will show that they nowhere mention that such control is under the Bankruptcy Court having *primary* jurisdiction.

Nevertheless the control of Trustee may be admitted to be in the Primary Bankruptcy Court *as long as he stays within the jurisdiction of that Court*, and then following

this reasoning we shall expect counsel for appellant to admit in return that the control of an ancillary trustee is in the Court appointing him.

Since the amendment of the Bankruptcy Act allowing ancillary proceedings in other states, we believe that the acts of the ancillary trustee are controlled by the United States Court of Bankruptcy which appointed him, and that the matters decided by said Court would be conclusive and that the Court of Bankruptcy having primary jurisdiction would be compelled to recognize the final orders entered by the Court appointing the ancillary trustee, that is, so far as matters within that State are concerned. Our contention, therefore, is that the act of the Trustee being within the jurisdiction of the Idaho Court, and his assenting and agreeing to do as Trustee what an ancillary trustee could have been required to do, places him in a position where the control over him as to matters and property within the State of Idaho, directly before the Court, would be as conclusive as it would over an ancillary trustee duly appointed. In other words, he is in effect an ancillary trustee, in so far as what he agreed to do in relation to the matters affecting the property situated in Idaho, and brought on by his own proceeding.

The act of the Trustee in assenting to the order whereby he was to do a certain thing which an ancillary trustee could have been ordered to do, was equivalent to his own appointment as ancillary trustee for said purpose. And he could not stand on one foot in the Idaho jurisdiction, as to matters which the Court there had under its control, and say, here I stand as an ancillary trustee and agree to do certain things—and then shift to the other foot upon cross-

ing the line into Utah and say, here I stand as the Trustee, and am controlled by the Utah Court and therefore will refuse to do what I promised to do in the nature of an ancillary trustee because I do not believe it is the best thing to do as Trustee.

NON-COMPLIANCE BY TRUSTEE OF THE MUTUAL ORDER ENTERED WITH HIS CONSENT WAS A LEGAL GROUND FOR VACATING SAME.

Appellant contends that even if the Trustee did not comply with the order of the Court that fact would afford no legal ground for vacating the injunction.

The first case cited by appellant is more in favor of appellees. Appellees are not disputing the fact that a Court acts in its discretion when granting an injunction. In fact this principle is adopted; and we contend that in the exercise of this discretion, the Court may place other terms in the Order in the nature of conditions precedent.

Neither is the other case, Shubert vs. Woodward, 167 Fed. 47, in point for the reason that the Court there refused to read or hear certain proof and ordered an injunction. In that case the lower court disregarded the evidence and of its own motion refused to consider the matter upon the merits. We believe the Circuit Court of Appeals properly reversed the lower court and held that although the lower court did not consider the matter upon the merits, the same must be considered by the appellate court. We do not believe that case can be applied to the present case. If the Court in the present case had, of its own motion, refused to consider the matter upon the merits and arbitrarily en-

tered the order of April 17th, then we believe appellant might well have cited the Shubert case in support of his contention. But in the present case, by the consent of all counsel, and with an express understanding on the part of the Court from counsel for the Trustee, the order of April 17th was entered. It simply amounts to this; that the Court having taken the position that the deferred payments were assets, then had another duty to perform, to-wit, appoint an ancillary trustee to assist in administering the assets in the State of Idaho. After discussing this question, counsel for the Trustee agreed that if the Court would not appoint an ancillary trustee that he would file a petition by the Trustee in the Utah Court to have done the very things which the ancillary trustee would be asked to do in Idaho. The Idaho Court no doubt realizing that it could not compel the Trustee to file such a petition in the Utah Court said: "Well, if you will do that, it will save me appointing an ancillary trustee here." And so it was with this understanding between all parties that such a procedure was agreeable to the Trustee and would be faithfully carried out that the Court allowed the attorneys to draft and prepare an order that was agreeable to both. That this was the understanding is clearly shown in the order of May 4th and in the order denying the supersedeas. Now, is it equitable for the Trustee, under such conditions, to appear before this Court and argue that the clause he consented to was an improper clause and therefore he can repudiate the same after he has assisted in having the Court enter such an order? We do not admit that the order was in any way improper, but even if it was, we then claim that the Trus-

tee by his assent to the order and by leading the Court to enter the same, is estopped from now claiming that it was an improper order. It must be remembered that by consent to such an order he induced the Court not to enter the alternative remedy of appointing an ancillary trustee in the State of Idaho.

Again, the action of counsel for Trustee in consenting to such an order and promising to execute the same ex parte induced counsel for defendants to assent to such an order. Otherwise, counsel would have objected to such a clause and stood on their rights and on the Trustee's own petition and asked that an ancillary trustee be appointed. Appellant admits in his brief that the Utah Court was unable to send process into the State of Idaho to stay defendants in their proceedings there, and the Trustee, thus knowing this to be the law, endeavored to take advantage of the order of April 17th by filing such a petition as raised all issues between the parties in the Utah Court and prayed for service upon West and Fitzgerald.

So we contend that the action of the Trustee in assenting to the order through his counsel and preventing the order which necessarily would have been made for the appointment of an ancillary trustee takes this case out of the class of such cases as the Shubert-Woodward case.

The Trustee wanted the Utah Court to get control of the entire matter and have the matters involved herein under his direct supervision. To get what he desired, he led the Idaho Court to believe he would do certain things. Now, can it be just or equitable for him to repudiate the very clause which conferred upon him the thing desired? Can he now say I have secured the advantage I sought, but I

will not comply with the clause assented to and which gave me such advantage?

The Trustee by his action has surely waived any right to now attack the order which his attorney agreed to—even prepared—and was instrumental in having entered.

Even granting, for the sake of argument, that, on the merits, the Trustee was entitled to a restraining order, there was at the same time another thing on the merits which the other parties were entitled to, namely, the appointment of an ancillary trustee. In order to get control of a matter which the Trustee did not control under the situation which had developed, to-wit, the matters of West and Fitzgerald as to lateral 33 and which would come under the supervision of the ancillary trustee when appointed, the Trustee, through his counsel, consented to the order containing a clause directing him to do certain things and agreed to comply therewith in lieu of a clause appointing an ancillary trustee. The irrigation season was about on, and immediate action was vital to defendants. So the consent of the Trustee to be directed in the same order to do the things which would give the relief required, made the order a mutual one. The Trustee should not, after the 18 days allowed him had expired, then report he had not done what the Court ordered, but had done something else more to his own liking and thus virtually say to the Court that it could do nothing about it either, because that portion of the order against the adverse party must stand as he was entitled to that regardless of his actions in violating that portion of the order directed to him. Under such a situation was it not lawful, legal, equitable and right for the

Court to do just as it did do, and treat the order as one mutual equitable order and vacate it in toto?

The appellant came into the Idaho Bankruptcy Court asking equitable relief by seeking to have a restraining order entered against the appellees. The principles and maxims in equity, to-wit, "He who seeks equity must do equity" and "He who comes into equity must come with clean hands" are too well established to even require discussion; these principles have been recognized in thousands of cases similar to the case at bar. We shall therefore content ourselves by merely stating the general principle of said maxims, from which it will be readily seen that the appellant herein is in no position to ask relief from the order of May 4th.

> "In applying the maxim, He who seeks equity must do equity, as a general rule regulating the action of courts, it is necessarily assumed that different equitable rights have arisen from the same subject matter or transaction, some in favor of the plaintiff and some of the defendant; and the maxim requires that the court should, as the price or condition of its enforcing the plaintiff's equity and conferring a remedy upon him, compel him to recognize, admit, and provide for the corresponding equity of the defendant, and award to *him* also the proper relief."
>
> "It is not alone fraud or illegality which will prevent a suitor from entering a court of equity; any really unconscientious conduct connected with the controversy to which he is a party, will repel him from the forum whose very foundation is good conscience."
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> 1 Pomeroy Eq. Juris. Secs. 397, 404.
>
> "This is a general principle, applicable to all classes of cases whenever necessary to promote justice, and requires that any person seeking the aid of equity shall have accorded, shall offer to accord, or will be compelled to accord to the other party all the equitable

rights to which the other is entitled in respect to the subject-matter. Relief inconsistent with the equities of the adverse party will be denied, and where the granting of relief raises equitable rights in favor of defendant, the according of such rights will be imposed as a condition of granting the relief. It is on this principle that one who has failed to perform his own obligations under a contract cannot compel the other to perform."

16 Cyc. 140-1. Citing many cases..

JOINDER OF APPEAL AND REVISION.

Appellant has, evidently out of abundant precaution, joined two methods of review, to-wit, an appeal and a petition for revision. It does not appear to us that such practice should be recognized by this Court.

It is not quite clear either, whether the attempted appeal is an equity appeal, under the general equity practice, or a bankruptcy appeal under Sec. 25a of the Bankruptcy Act. If an equity appeal, then we object to the same for the reason that it would be improper to join same with a petition for revision in bankruptcy matters, covering not only the order appealed from but another order.

If a bankruptcy appeal, then we complain because what is a matter of appeal under Section 25a of the Bankruptcy Act, is not a matter of revision under Section 24b. There can be no question under the direct provisions of Section 24b, that the Appellate Court can only revise matters of law. The cases are unanimous on this point and it is needless to cite same.

Questions of law are alone reviewable in proceedings under Section 24b, by petition for revision, if a review of

questions both of law and fact is sought, the remedy is by appeal.

If such a procedure is countenanced by this Court or other United States Courts, we contend then, that it at least should only be in cases where the errors assigned are identical, and not cases where the petition for revision raises additional errors from those raised on the appeal, and the Court is asked to revise the same order as the one appealed from.

While there may be cases where Courts have recognized the joining of a bankruptcy appeal and a petition for revision on the same identical matter, and from the same order, we are satisfied that not a single case can be found where a bankruptcy appeal on one order has been joined with a petition for review on another order, or where an equity appeal has been joined with bankruptcy revision. In the petition for revision herein, appellant seeks to revise the orders of April 17th and May 4th, while the appeal herein is from the order of May 4th only.

Appellant has only one remedy and he should select the one desired. It seems unfair for a party to say: "I have a remedy, but I will not determine exactly what remedy I have, but will leave it to the Court to solve and therefore will join all remedies which I might have, in order to be safe. It is fair neither to the Court nor to counsel for appellees. No argument is made and no authorities are cited by appellant to assist the Court in determining which is the proper remedy except two on appeals and from this we might infer that appellant believes an appeal to be his remedy. So it will be necessary for this Court to make an examination into the matter of its own accord to determine

what remedy the appellant has. And it is very essential that this Court decide which is the proper remedy. If the remedy is by appeal from such orders, then only questions should be considered by this Court as raised on the appeal and the appeal is from one order only. But in the petition for revision they seek to have the former order, not appealed from, revised and assign a new error in regard to a certain portion of said order. Therefore if an appeal is proper, the errors raised on the petition for revision under the order of April 17th, cannot now be raised as no appeal was taken from said order and the time for an appeal has expired. And this is very important for the reason that if an appeal is proper and no appeal was taken from the first order, then that order must stand just as it is and appellant surely cannot ask relief therefrom when he fails and refuses to carry out that part of the order directed to him.

Appellant gives this Court no light as to which is the proper procedure and we are at a loss to know whether they expect appellees to brief this question or whether they intend to leave it to this Court.

It does seem that appellant should have briefed the question thoroughly and presented the authorities on both remedies to this Court and then have shown that the question of the proper remedy herein was so close that appellant is justified in joining two bankruptcy reviews, or had a right under the practice of Federal Courts to join an equity appeal with a bankruptcy revision.

A combination of an appeal and a simultaneous revisory petition is also unfair to appellees for the reason that if they are unsuccessful in this Court, then it will necessitate a division of the record on appeal to determine what costs

on appeal they should pay. They surely cannot be charged with costs on the improper remedy. Therefore we contend that it is necessary for this Court to first decide which remedy is appropriate and then consider the assignments of error raised in the review under such remedy.

It is further unfair to the appellees for the reason that if a bankruptcy appeal is the proper remedy, then the record shows that the same was not taken or perfected within the ten-day period as prescribed by Sec. 25a of the Bankruptcy Act; and to properly meet this, appellees should file a motion to dismiss and argue the same. It then might turn out that this Court would hold that the petition for revision was the proper remedy and therefore the appeal was of no force and effect. Then appellee would have wasted their time and the time of this Court in presenting a motion to dismiss a useless and improper appeal. If the appeal is not the proper remedy herein, then, of course, it makes no difference whether or not the appeal was perfected in time, as it is of no force or effect. Then again, if this Court held that an appeal is proper, then appellees should be given an opportunity to move to dismiss the appeal because the Court probably would not do so of its own motion. Appellant may say that we should move to dismiss at this time, but then as heretofore shown, this would necessitate an argument which might be useless if the Court first holds that the appeal is not a proper remedy as in such case there would be no need of a motion to dismiss, on the ground that it was not taken in time. It would be a question of jurisdiction and this Court would of its own motion then dismiss the appeal. And so if this Court believes it has no jurisdiction to hear an equity appeal joined

with a bankruptcy revision then it should of its own motion dismiss the proceedings.

From the foregoing, we submit that the order of the United States District Court vacating its former order of April 17th should be sustained, and that appellant under his petition for revision should be denied any relief.

Respectfully submitted,

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